Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-64

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILEY SMITH,

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a body politic and corporate; PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation; and JAMES T. BAYER, F. JAMES VOSS, and F. J. SERAFINI, election commissioners for THE CITY AND COUNTY OF DENVER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Colorado has not been officially reported but is unofficially reported at 495 P.2d 203 and is included as Appendix A to the

Petition. The findings and conclusions of the trial court, entered March 19, 1969, are attached as Appendix 1 to this Brief in Opposition.

JURISDICTION

The jurisdictional requisites are stated in the Petition.

QUESTION PRESENTED

Whether the Colorado state courts erred in dismissing a suit to void an election because the plaintiffs failed to allege and prove, as required by Colorado law, that the election result might have been different in the absence of the alleged illegality.

CONSTITUTIONAL AND CHARTER PROVISIONS INVOLVED

The pertinent provisions of the Constitutions of the United States and Colorado and of the Charter of the City and County of Denver are set forth at Pet. App. B.

STATEMENT

In this action, filed March 14, 1967, petitioners sought to invalidate a special election held February 7, 1967, at which the voters of the City and County of Denver approved the grant of a franchise to respondent Public Service Company of Colorado for use of the Denver city streets and public ways for the distribution of electricity, gas, and steam (Pet. App. A at 7; App. 1, *infra*, at 1a-2a.)

The issue was submitted to the voters pursuant to provisions in the Colorado Constitution (art. XX, sec. 4) and the Denver Charter (sec. C3.1) describing the electorate for such an election as "qualified taxpaying elec-

tors." Under those provisions, only voters who had paid a property tax during the preceding 12 months were permitted to vote, while registered voters who had not paid such taxes were permitted to vote only upon other propositions on the ballot. (Pet. App. 7; pp. 2a, *infra*). The restriction on the right to vote on the franchise question to property taxpayers was stated in the notice of the election, published 27 days before the election (Pl. Ex. B).[1]

Of 204,687 registered voters in the City and County, 91,691 voted in the election. Of these, 76,601 voted on the franchise question, and according to the court below the remaining 15,090 presumably were not property taxpayers and therefore were not permitted to vote. The franchise was approved by a vote of 66,566 to 10,035, a margin of 56,531 more votes "for" than "against." (Pet. App. A at 7; App. 1, *infra*, at 3a.)

On March 14, 1967, petitioners commenced this action to void the election and annul the franchise, on the ground, among others, that restriction of the right to vote to property taxpayers violated the Fourteenth Amendment to the United States Constitution. Petitioners commenced the action 62 days after publication of the notice of the election stating who would be allowed to vote; 35 days after the election itself; and not less than 18 days after the expiration of the ten-day period allowed by the Colorado statutes for contesting those elections that are subject to challenge (C.R.S. 1963 (1965 Perm. Supp.), 49-25-127). In the meantime, the fran-

[1] Petitioners assert in their petition that before the election Public Service Company "conducted a massive newspaper, radio, television, and door-to-door advertising campaign telling the electors that they had no right to vote if they were not property taxpayers," "intense publicity" that "blanketed" the City and County of Denver "for several weeks" (Pet. 3). That assertion is not supported either by a citation to, or anything in, the record, and is denied by respondents. See f. 325.

chise had become effective, and respondent Public Service Company had paid $68,000 to the City and County for election expenses and $1,110,000 for acquisition of street lighting facilities (Pl. Ex. B). In addition, by the time of trial, respondent Public Service Company had made franchise payments of $3,800,000 (f. 559).

The trial court dismissed the action pursuant to the findings and conclusions reproduced in Appendix 1 to this Brief in Opposition (pp. 1a-5a, *infra*). The action was dismissed as to petitioners Charles and Patricia DeMoulin because they had been allowed to vote and therefore were not affected by the voting restrictions they seek to challenge. The action was dismissed as to the other petitioners because those petitioners failed to allege and provide that the alleged illegality in the conduct of the election had an effect on its outcome.[2] (App. 1, *infra*, at 2a-4a.) In that connection, the margin of votes "for" over votes "against" (56,531) greatly exceeded the number of electors who voted at the election but did not vote on the franchise question (15,090). In addition, petitioners failed to allege or prove how many of the 112,996 registered electors who failed to vote at all had not paid property taxes and therefore would have been subject to the restriction challenged in the suit, although this figure can be developed readily from public records in Denver. (App. 1, *infra*, at 3a, 4a; Pet. App. A at 8.)

On appeal, the Supreme Court of Colorado affirmed. In the meantime, after the trial court decision, this Court had decided *Kramer* v. *Union School District*, 395 U.S.

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[2] Though the trial court held that it had no power to set aside the election, in light of petitioners' failures of pleading and proof, it also concluded that the respondent election commissioners improperly excluded registered voters who had not paid property taxes but had paid other taxes, such as the virtually universal sales tax, and announced that in future elections such persons should be permitted to vote. See App. 1, *infra*, at 4a.

621 (1969), *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), and *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970), invalidating restriction of the right to vote to property taxpayers. The Colorado court did not reach the Fourteenth Amendment question, however (Pet. App. A at 7), because petitioners had failed to show that the restriction could have affected the election outcome. In that regard, the court stated that "[i]f the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved" (Pet. App. A at 8). To be sure, petitioners had "argued that advance advertising to the effect that non-taxpaying electors could not vote on the franchise caused many non-taxpayers to fail to go to the polls" and those nonvoters "might have appeared and defeated the franchise."[3] The court rejected that argument too, however, stating that to be successful plaintiffs would have to show, among other things, "how many of the registered voters were not taxpayers." The court based its ruling on Colorado decisions governing pleading and proof in suits to invalidate elections. (Pet. App. A at 8.)

REASONS FOR DENYING THE WRIT

This application by the Colorado courts of the jurisdictional principle at issue does not warrant review by this court.

1. The decision below rests upon an adequate state ground—that a plaintiff who seeks to have an election set

[3] As noted previously, see n. 1, *supra*, there is nothing in the record to support petitioners' assertion in that regard. Indeed, Appendix A to Respondents' Brief in the court below (certified as part of the record here), shows that, of seven special elections held during the period from June 1964 through November 1967, the number of voters in the election at issue here was greater than in any other election, both in terms of total vote and in terms of percentage of registered voters voting.

aside must plead and prove that the illegality of which he complains could have affected the election outcome. Petitioners attack the adequacy of that state ground, claiming that it is in effect an invalid restriction on the right to vote. Thus, they say, the Colorado court held "that propertyless electors have no right to vote unless they come into court after the election and establish that their ballots" might have made a difference in the outcome (Pet. 5). However, the Colorado court held nothing with respect to the right to vote. Its holding, that a plaintiff who seeks to set aside an election must plead and prove the size of the class affected by the illegality of which he complains, does not impose an unreasonable burden on such a plaintiff and has no application whatever to a plaintiff who seeks declaratory relief as to the illegality of a restriction on the right to vote and preventive relief for the future. While petitioners suggest that the Colorado court's holding as to pleading and proof may conflict with this Court's decisions in *Kramer*, *Cipriano*, and *Kolodziejski*, none of those cases presented the question whether a state can require a plaintiff to show that the election result might have been different in the absence of the alleged illegality of which he complains. Indeed, in *Kramer*, the plaintiff did not seek to invalidate an election, and in *Cipriano* the plaintiff proved that the number of non-taxpayers barred from voting exceeded the margin in the election.[4] The fact is that the rule on which the decision below was based has been followed by virtually every court that has ever considered the question. See, *e.g.*, 26 Am. Jur. 2d, *Elections*, pp. 145-146 at n. 17; 29 C.J.S., *Elections*, p. 690 at n. 81; McCrary, *Elections* (4th ed.), §§ 235, 523-524; and cases cited.

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[4] The plaintiff proved that of 11,606 registered voters, 6,926 were nontaxpayers not eligible to vote under the restriction in question in the case, while the bonds in issue had been approved by a margin of only 932 voters. 286 F. Supp. at 829. Thus, the exclusion of nontaxpayers obviously might have affected the outcome.

2. Moreover, there are a number of additional procedural obstacles, under state law, to a decision on the merits of petitioners' constitutional attack on the conduct of the Denver election.—(a). Under Colorado law, a franchise can be challenged only in proceedings in the nature of *quo warranto* under Colorado Rule 106(a)(3), asserting the rights of the public, not in a private action asserting no interest other than that of the public generally. *Vickery* v. *Wilson*, 40 Colo. 490, 496-497, 90 Pac. 1034, 1036; *Denver & Swansea R. Co.* v. *Denver City R. Co.*, 2 Colo. 673.[5] Petitioners failed to comply with that requirement.—(b). Moreover, in cases in which Colorado law does allow private suits to contest municipal elections, the action must be commenced within 10 days after the vote canvass, which must be made no later than 7 days after the election. C.R.S. 1963 (1965 Perm. Supp.), 49-25-115, 49-25-127.[6] Petitioners did not file suit until 35 days after the election. (See p. 3, *supra.*) —(c). The action was instituted after respondent Public Service Company had made substantial outlays in reliance on the franchise. (See pp. 3-4, *supra.*) Accordingly, the action was barred by laches. *E.g.*, *McKnight* v. *Whipple*, 25 Colo. 469, 471, 55 Pac. 182, 183.

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[5] See also *People ex rel. Mijares* v. *Kniss*, 144 Colo. 551, 553, 554, 357 P.2d 352, 353, 354; *People ex rel. Barton* v. *Londoner*, 13 Colo. 303, 314, 22 Pac. 764, 768; *Williams* v. *People*, 38 Colo. 497, 88 Pac. 463.

[6] As we read C.R.S. 1963 (1965 Perm. Supp.) 49-25-125 *et seq.*, such suits are allowed only in cases in which the election of municipal *officers* is contested. Accordingly, the election involved in this case, to determine a municipal *question* submitted to the voters, is subject to challenge only through *quo warranto* proceedings, as we contend under subhead 2(a). But if section 49-25-125 *et seq.* is construed more broadly to allow private suits to contest the result in elections to determine municipal questions (see C.R.S. (1963 Perm. Supp), 49-25-51 (3)(c)), such a suit would be subject to the 10-day limitation set forth in section 49-25-127, with which petitioners failed to comply.

The court below did not reach these state procedural issues, although they were raised by respondent. The holding below as to petitioners' pleading and proof was sufficient to dispose of the case. These state procedural issues would have to be resolved before the merits of petitioners' constitutional attack on the election could be considered, however, in view of the familiar principle that constitutional issues should be decided only if the case is not subject to disposition on nonconstitutional grounds.

3. Finally, even if the constitutional issue presented by petitioners' attack on the Denver voting restriction could be reached in this case, that issue does not warrant review by this Court. The applicable constitutional principle—that the right to vote cannot be conditioned upon the payment of taxes—is now clearly established, in view of this Court's decisions in *Kramer*, *Cipriano*, and *Kolodziejski*. Reiteration of that principle in this case would add nothing to what the Court has already said on the subject. A decision with respect to the matter would not even be of any importance in Denver, for there is no reason to suppose that election officials in Denver will not comply with this Court's previous rulings.[7] As for this case itself, petitioners' claims are barred by this Court's determination that the holdings in *Cipriano* and *Kolodziejski* are prospective only and do not apply in a case like this one in which the authorization approved in the election was "legally complete" when those cases were decided and inequitable results would follow from retroactive application of the holdings in those cases. 395 U.S., at 706; 399 U.S., at 213-215.

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[7] In that regard, while subsequent events are of course not a matter of record, it is our understanding that since this Court's decisions in *Kramer*, *Cipriano* and *Kolodziejski*, Denver election officials have not enforced the voting restriction attacked by petitioners in elections to which it would apply if it were valid.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Civil Action No. B-99756 Div. 5

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILEY SMITH, on behalf of themselves and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, a body politic and corporate, PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, JOHN MACDONALD, DONALD M. NICHOLSON, and F. J. SERAFINI, formerly Election Commissioner, of the CITY AND COUNTY OF DENVER, and JAMES T. BAYER and F. JAMES VOSS, Election Commissioner for the CITY AND COUNTY OF DENVER,

Defendants.

FINDINGS, CONCLUSIONS OF LAW AND ORDER

THIS MATTER coming on to be heard upon the complaint of the above captioned plaintiffs, and after trial the Court having considered the stipulations of counsel, the evidence adduced by the parties, and having heard the statements of counsel;

THE COURT FINDS:

1. This is a proceeding brought by the plaintiffs on behalf of themselves, individually, and as a class action on behalf of all other persons similarly situated, which action seeks to void the results of an election held Feb-

ruary 7, 1967 at which election those voting on the question approved the grant of a franchise to Public Service Company of Colorado. Said franchise was submitted to a vote by an ordinance duly passed by the City Council of Denver. It was shown that at said election the plaintiffs Charles J. DeMoulin and Patricia DeMoulin, voted and that the remainder of the plaintiffs did not vote. Further references in the order to the plaintiffs are meant to mean only the plaintiffs other than Charles J. DeMoulin and Patricia DeMoulin.

2. The plaintiffs Jeanne E. Shannon, Barbara A. Rutherford, Sally Snelling, Wayne Knox, Virginia Kuhn and Wiley Smith were citizens and qualified electors in the City and County of Denver at all times pertinent hereto but such plaintiffs did not own real or personal property subject to taxation in the City and County of Denver, nor pay *ad valorem* taxes within the 12 months preceding said election, although said plaintiffs paid sales taxes and other taxes to the City and County of Denver during said period; said plaintiffs signed voter signature cards received in evidence as Exhibit B at said election and in completing the same checked the box opposite the phrase "Am a registered elector of this precinct" and did not check the box opposite the phrase "Am a registered property taxpaying elector of this precinct." It was not shown that these plaintiffs made any request to vote on the franchise question, or that any person requesting to vote was refused the right to vote on the franchise question, nor did such plaintiffs make any protest to the judges of said election; said plaintiffs voted only upon the issues submitted other than the franchise question appearing on the ballot, the franchise question being locked off in the voting machines; that the plaintiffs Charles J. DeMoulin and Patricia DeMoulin were permitted to and did vote upon the question of granting a franchise to Public Service Company of Colorado.

3. No allegation was made in plaintiffs' complaint nor was any evidence offered as to the number of registered electors in the City and County of Denver who *were not ad valorem* taxpayers, or that there was a sufficient number to have overcome the majority of votes case in favor of granting the subject franchise.

4. That at said election of February 7, 1967 a total of 91,691 persons voted; that at said election, in addition to the question of the approval of the franchise to Public Service Company of Colorado, other issues were voted upon by the electors; that only persons who were otherwise qualified as an elector and who, during the 12 months next preceding said election, had paid an *ad valorem* tax upon real or personal property situated within the City and County of Denver and owned by said persons were permitted to vote upon the question of the approval of the franchise to Public Service Company of Colorado. On that question the vote was 66,566 in favor of granting the franchise and 10,035 against granting the franchise.

5. That no allegation has been made and no proof has been tendered by the plaintiffs that if other than *ad valorem* taxpayers had been permitted to vote, the results of said franchise election would have been otherwise; and that to assume that such acts complained of affected the election results would be sheer speculation.

THE COURT CONCLUDES AS A MATTER OF LAW:

1. This Court does not have the power or authority to annul or declare void an election except upon a showing that said election was illegally conducted and that as a result of said illegality the true will of the majority was not expressed and that but for such alleged illegality, the result of the election would have been otherwise.

2. Plaintiffs purporting to represent a class of electors who were not *ad valorem* taxpayers did not allege or attempt to show the size of such class, or that it was sufficient in size to have affected the results of the subject franchise election if the class had been permitted to vote.

3. The vote in favor of granting the subject franchise was overwhelming and it would be an entirely unwarranted assumption to conclude as a matter of law that if the election were held again, the result would be otherwise. This Court is not authorized, and indeed, should not engage in speculation as to the effect of the irregularities complained of by plaintiffs in the absence of proof that such matters affected the outcome of the election.

4. Notwithstanding the foregoing, however, this Court is of the opinion and ruled in the course of these proceedings that the Election Commission improperly defined the term "qualified taxpaying electors" to exclude therefrom those persons who had paid sales and other taxes to the City and County of Denver even though they were not *ad valorem* taxpayers, and this opinion is rendered for the guidance of election officials in similar proceedings in the future.

5. In addition, the plaintiffs Charles J. DeMoulin and Patricia DeMoulin, should be dismissed from this proceeding inasmuch as they have not shown that any actions of the defendants deprived them of any rights which they have asserted and they have no justiciable interest in the outcome of this case.

THE COURT FINDS the issues herein joined in favor of the defendants and against the remaining plaintiffs and ORDERS the complaint of the plaintiffs dismissed, all parties to pay their own costs. March 19, 1969

BY THE COURT:

/s/ Julius Brooks, Jr.
Judge